

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0014-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LUIS ENRIQUE ORTEGA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071579

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Luis Ortega

Florence
In Propria Persona

HOWARD, Chief Judge.

¶1 Luis Ortega petitions this court for review of the trial court’s summary dismissal of his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review but deny relief.

¶2 Ortega was convicted after a jury trial of two counts each of sexual abuse of a minor under the age of fifteen, child molestation, sexual conduct with a minor under the age of fifteen, and threatening or intimidating. The trial court sentenced him to a total of fifty-seven years' imprisonment. On appeal, we vacated the conviction and sentence for one count of child molestation but otherwise affirmed his convictions and sentences. *State v. Ortega*, 220 Ariz. 320, ¶ 1, 206 P.3d 769, 771 (App. 2008). Ortega then sought post-conviction relief, arguing his trial counsel had been ineffective. The trial court summarily dismissed his petition, and we denied relief on review. *State v. Ortega*, No. 2 CA-CR 2010-0001-PR (memorandum decision filed Apr. 27, 2010).

¶3 In August 2010, Ortega filed a successive notice of post-conviction relief requesting that counsel be appointed. He indicated in that notice that he wished to raise claims of newly discovered material facts, a significant change in the law, actual innocence, and that his failure to file a timely notice of post-conviction relief or notice of appeal was without fault on his part. Ortega further stated in his notice that he “raises subject matter jurisdiction for [an] illegal sentence.” Through appointed counsel, Ortega then filed a petition for post-conviction relief arguing only that he actually was innocent of one of the counts of threatening and intimidating because “[t]here was no testimony that [Ortega had] threatened [the victim]” on the date alleged in the indictment. The trial court summarily dismissed the petition, acknowledging that a claim of actual innocence was not necessarily subject to preclusion but concluding Ortega had failed to comply

with Rule 32.2(b) because he had not “set forth the substance of the specific exception [to preclusion]” nor “the reasons for failing to raise this claim in his previous [p]etition.”

¶4 In his pro se petition for review, Ortega appears to assert he is entitled to relief because his counsel below had been ineffective in failing to raise various claims proposed by Ortega and failing to provide the trial court with the substance of the exception to preclusion or the reasons the claim had not been raised in Ortega’s previous petition. First, we observe that, as a non-pleading defendant, Ortega is not constitutionally entitled to the effective assistance of Rule 32 counsel. *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). And, even if such a claim were cognizable under Rule 32, Ortega cannot raise it for the first time in a petition for review. *See* Ariz. R. Crim. P. 32.9(c) (party may petition appellate court “for review of the actions of the trial court”; petition for review must include “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). Accordingly, Ortega has not met his burden of demonstrating that the trial court erred in summarily rejecting the sole claim raised in his petition for post-conviction relief. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶5 Ortega additionally raises a variety of claims not raised in his petition below, although he alluded to some of those claims in his notice. But a trial court does not err in declining to address claims not raised in the petition. *See* Ariz. R. Crim. P. 32.5 (requiring that defendant “include [in petition] every ground known to him . . . for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed”); Ariz. R. Crim. P. 32.6(c) (requiring court to “review the petition” and

permitting summary dismissal of petition if “no purpose would be served by any further proceedings”). And we will not address claims raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider issues raised for first time on review).

¶6 For the reasons stated, although review is granted, relief is denied.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Michael Miller
MICHAEL MILLER, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.